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Supreme Court of the United States

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER, APPELLANT,

vs.

STATE OF RHODE ISLAND

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

BRIEF FOR APPELLANT

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Opinions Below

Two opinions were written by the court below in this case. The first opinion answered certified questions, holding that the ordinance in question was valid. 83 A. 2d 67. This opinion appears in the record. [43-56][1] The second opinion gave the reasons for the affirmance of the conviction entered following the return of the answers to the certified questions. This opinion is reported at 91 A. 2d 27. It also appears in the record. [1-10]

[1] Figures appearing in brackets herein refer to pages of the printed transcript of record.

Jurisdiction

The judgment of the Supreme Court of Rhode Island affirming the judgment of the Superior Court was entered August 12, 1952. [9] The judgement became final on August 12, 1952. [9] The petition for appeal to this Court was allowed within 90 days after the judgment became final. [56] The appeal to this Court was timely allowed. [58] Probable jurisdiction was noted by this Court on November 10, 1952. [62]

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Question Presented

Does the prohibition in the ordinance of holding a meeting for, and speaking in the park upon a religious or political subject, both on its face and as construed and applied, constitute a violation of the federal Constitution because it amounts to a prohibition of the exercise or an illegal burden and abridgment of the appellant's rights of freedom of speech, assembly and worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

The question was raised by motions to quash and to dismiss filed in the Superior Court of Rhode Island. [10, 12, 21, 40] This question was adversely determined by the Superior Court and by the Supreme Court of Rhode Island. [12, 21, 41]

Statute Involved

This case draws into question the validity of an ordinance of the City of Pawtucket, duly enacted on August 17, 1916, Chapter 149, which provides as follows:

> No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.

The entire ordinance was received in evidence as an exhibit. [14] It is printed in the record. [54-56]

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellant relies upon read as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws.

Statement

Nature and History of Action

This is a criminal case. It is an appeal from a judgment of the Supreme Court of Rhode Island affirming a judgment of conviction on trial *de novo* in the Superior Court of Rhode Island on appeal from the District Court of Pawtucket. [13] The appellant was charged by complaint with violating the ordinance in question on September 3, 1950. The complaint and warrant, among other things, charged as follows:

> On the 3rd day of September A.D. 1950, with force and arms, William B. Fowler alias John Doe laborer, of said Pawtucket, did violate Section 11 of Chapter 149 of the ordinances of the City of Pawtucket in that he did address a religious meeting in a public park, to wit; Slater Park against an Ordinance of the City of Pawtucket and against the Statute and the peace and dignity of the State. [13]

Appellant pleaded not guilty in the District Court. He was found guilty and fined. [13] He appealed to the Superior Court. [13] On the first hearing before the Superior Court of Rhode Island the case was reserved and questions certified to the Supreme Court of Rhode Island. [1, 43-57] The Supreme Court of Rhode Island answered the questions that the ordinance was constitutional. 83 A. 2d 67.

The case was tried in the Superior Court following the opinion of the Supreme Court of Rhode Island. The appel-

lant pleaded not guilty. [12] A jury trial was waived and the case was tried to the judge alone. [12-13] At the close of the evidence a motion for judgment of acquittal was made. [21, 40] On October 22, 1951, the court overruled it and rendered a judgment convicting appellant. [41] He was fined $5.00. [41]

The constitutional question was raised by a motion to quash and by a motion to acquit filed in the Superior Court of Rhode Island. [12, 21, 40-41] The question presented in that court was considered and overruled. [12, 21, 41] Each holding of the trial court was presented on appeal to the Supreme Court of Rhode of Island and duly assigned as error. [1, 2, 3, 9] Each federal question presented upon this appeal was overruled by the Supreme Court of Rhode Island. [9] A judgment of affirmance was entered. [9]

Facts

Slater Park is a public park within Pawtucket, Rhode Island. [14] Fowler was arrested because he addressed a religious gathering of four hundred people in that park on September 3, 1950. [15]

Slater Park is 194 acres in size. It has tennis courts, a children's playground, a bandstand, a lake with boats on it, a baseball field, 16 fireplaces to accommodate picnickers, animal and bird compounds, extensive floral gardens and large natural woodlands. It is intersected by improved roads. Also, there is ample space in the park for public assemblies. Public meetings can be held without interfering with other activities in the park. [14]

It is the policy of Jehovah's witnesses to give Bible talks to religious assemblies in public parks throughout the United States during the summertime. [36]

Jehovah's witnesses applied for and received permission to use the park for the holding of a religious assembly and

the giving of a Bible talk. [21-22] Their application for permission was granted for August 20 and 27, 1950. [23-24]

Fowler is an ordained minister of Jehovah's witnesses and a direct representative of the Watchtower Bible and Tract Society, the legal governing body of the group. [26] He is associated with the Cambridge, Massachusetts, congregation of Jehovah's witnesses. [27] Before September 3, 1950, he had been invited to give two talks in Slater Park in Pawtucket. One was on August 27 and the last was on September 3, 1950. [27] While no trouble was experienced on August 20, appellant was stopped while attempting to give a Bible discourse to a religious assembly on August 27, one of the dates covered by the permit. [24, 32][2]

Notwithstanding the fact that he was prevented from completing his talking to an assembly in Slater Park on August 27, Fowler agreed to address another religious assembly with a Bible talk on September 3, 1950 in the park. [27]

Fowler arrived at the park at 3:45 in the afternoon. [27] The place where the assembly was to be held was about one-half mile inside the park. [29] The spot for the assembly was shaded with trees. Four hundred persons were gathered. Some were seated but the greater number of the group were standing on the grass in the park. [15, 17, 28, 31] The place of assembly was suitable. [28] There were no other meetings anywhere around. The place of assembly was quiet and the assembly of four hundred persons did not interfere with the use of the park by any other persons. [29] There was no disturbance or annoyance, no use of foul language and no person was attacked. There were no threats of breach of the peace. [18]

About five minutes to 4:00 o'clock on Sunday afternoon,

[2] The trial court properly held that evidence of permits, previous assemblies and prior difficulty was immaterial. [23, 25-26]

September 3, 1950, Fowler began speaking to the assembly of four hundred persons. [28] The subject that he spoke on was "The Pathway to Peace". [30] The chief of police arrived shortly after the assembly was gathered and the Bible talk was in progress. [16-17, 31] The chief of police found Fowler addressing the audience through a microphone connected with two loud-speakers. [16] The assembly had previously been brought to order by a chairman. [31] Fowler had introduced his speech, "The Pathway to Peace," by referring to President Truman's talk on peace. He showed from Scriptural proof that the world, and this country in particular, was in the same status that Babylon was in "before its destruction some two thousand years ago". The chief of police testified to this. [16, 31] The chief heard Fowler say that it was futile for the nations to attempt to make peace because they were pursuing the wrong method to obtain it instead of the way prescribed by Jehovah. [16] Fowler added that the people had reached the time of "the end of this wicked system of things". [31]

At the end of the first five minutes of Fowler's talk the chief of police approached him while he was speaking to the assembly at the rostrum. [16-17] The chief of police asked Fowler if he had authority to speak in the park. Fowler told the chief that he did not need permission. [17, 32] Fowler had previously told the chief that the authorities at Pawtucket did not have the right to stop Jehovah's witnesses from using the park, when he was stopped by the chief of police before. [32] The chief of police informed Fowler he was placing him under arrest for a violation of the ordinance in question. Fowler informed the chief of police that he was an ordained minister of Jehovah's witnesses. [18] Fowler told the chief further that he had been speaking for Jehovah's witnesses for over thirty-eight years and that he had been assigned as the speaker "of the day". [17] The chief of police took Fowler into cus-

tody and brought him to the police station in Pawtucket. [17]

Fowler informed the chief and another police officer at the station that they had violated his rights guaranteed by the United States Constitution and that Jehovah's witnesses did not come to the park for an evil purpose but that they assembled in the park and he had given the talk "for the purpose of doing good and, certainly, the people of Pawtucket need some good instructed into them as well as other cities and towns in the country". He pointed out that the sole purpose of the talk at the assembly was to exalt the name of Jehovah God and tell the people that "His kingdom was at hand" and that it was "the only possible solution to the world's trouble". [32-33]

The chief of police admitted that the only reason for the arrest was not because of any misconduct or disturbance but solely because Fowler failed to "have legal authority to be in the park to make this speech and hold the assembly". [18-19] The chief of police realized that it was impossible for Fowler to have a permit because the ordinance forbade religious talks and assemblies in the park. [19] He added that Fowler was courteous and polite in all of his dealings with him. [19]

Fowler informed the officials that they should have stayed in the park and seen that order was observed and that he was given an opportunity to tell the people of Pawtucket "God's message", rather than arrest him. [33]

Fowler was fingerprinted, photographed and listed in "the Rogue's Gallery" of Pawtucket because he preached in the park, contrary to the ordinance. [34]

Summary of Argument

Ordinances absolutely prohibiting distribution of literature on streets have been held unconstitutional. *Jamison* v. *Texas*, 318 U.S. 413. The same principle applies to ordinances prohibiting assemblies and talks in public parks without permits. *Hague* v. *C.I.O.*, 307 U.S. 496; *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 73 N.E. 2d 241. By force of the same reason the ordinance here is unconstitutional because it contains an outright prohibition of the use of the parks for religious and political assemblies.

Davis v. *Massachusetts*, 167 U.S. 43, is not in point because it involved no outright prohibition of the use of the parks as is done by this ordinance. The ordinance in that case provided for a permit for park meetings. The court below unlawfully simulated this case to the *Davis* case. If the two cases are alike and the *Davis* case is drawn in question by the facts here, then it is contended that *Davis* v. *Massachusetts*, *supra*, is inapplicable because it has been narrowed or cut down by *Hague* v. *C.I.O.*, 307 U.S. 496, and *Jamison* v. *Texas*, 318 U.S. 413. See *State* v. *Derrickson*, 97 N.H. 91, 81 A. 2d 312; *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 73 N.E. 2d 241. If it is a fact that *Davis* v. *Massachusetts*, *supra*, has not been overruled and should that case be found in point, then the Court is requested to overrule the decision in the *Davis* case or clarify the present status of the decision in view of later decisions by the Court.

The Pawtucket ordinance cannot be saved because it confines itself to religious and political assemblies. The doctrine of separation of church and state does not prevent a religious speaker from claiming the benefits of freedom of assembly. As long as there is no appropriation of the use of the public park property to the exclusive use of Jehovah's witnesses and since the use of the park by appellant is the same as the use that any other speaker makes of the park, it cannot be said that the separation decisions of this Court

prevent the speech and assembly in the park in this ca
Compare *McCollum* v. *Board of Education,* 333 U.S. 2
with *Zorach* v. *Clauson,* 343 U.S. 306. See *Niemotko* v. *Ma*
land, 340 U.S. 268, at pages 272-273, where the Court
clined to decide this point.

There is no discrimination against religion's claim
its use of freedom of speech and assembly guaranteed
the Constitution. Since there is no express limitation
withdrawal of the protection granted by the Constitut
under the freedom of assembly guarantee, then none
be impliedly drawn or read into the First Amendment
a court decision.

Appellant, in speaking in the park, was entitled to
same right under the Constitution as would have beer
speaker on a social, educational or scientific subject addre
ing a secular audience in the park. He is entitled to ass
that the ordinance is unconstitutional on its face and
construed and applied to his use of the park, for the reas
fully set forth in the argument below.

Argument

The prohibition in the ordinance of holding a meeting and speaking in the park upon a religious or political subject, both on its face and as construed and applied, constitutes a violation of the federal Constitution because it amounts to a prohibition of the exercise or an illegal burden and abridgment of the appellant's rights of freedom of speech, assembly and worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The decision of the court below flies in the teeth of the decision in *Jamison* v. *Texas*, 318 U.S. 413: There the Court held invalid an ordinance that prohibited the distribution of literature. In this case the ordinance prohibits holding a meeting and giving a speech on lawful and constitutional subjects in the park. There is no difference between the rights of freedom of press, speech, assembly and worship guaranteed by the First and Fourteenth Amendments against state abridgment. The distinction of the *Jamison* decision because freedom of the press was involved there and not freedom of speech, assembly and worship, as here, is a futile effort by the court below. The court missed the mark. It has failed to make a distinction. The attempted distinction is a distinction without a difference which must be corrected by the Court.

The Court in the *Jamison* case, *supra*, held that an ordinance which prohibited the exercise of constitutional rights on the streets was void. The ordinance in this case prohibits the exercise of such liberties in the park. There is no distinction between prohibition of the exercise of rights on the streets and in the parks. The fact that literature rather than speech was involved in the *Jamison* case is immaterial.

The right of free speech is as strong as the right of fr
press. Neither can be prohibited as is done by the ordinan
in this case.

In *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 73 N.
2d 241, the Supreme Judicial Court said that, "Some
these decisions relate to the distribution of printed matt
in streets and ways, but it seems plain that in respect
general principles no distinction can be drawn between th
right to distribute printed matter and the right of publ
speech or between the exercise of those rights in publ
streets and their exercise in public parks."

The court below relied heavily on *Davis* v. *Massach*
setts, 167 U.S. 43. This Court's attention is called to th
decision in the *Gilfedder* case, *supra*, where the Suprem
Judicial Court of Massachusetts, among other things, said

"A series of recent decisions by the Supreme Court o
the United States has, as we read the cases, established th
proposition that the exercise of these rights cannot b
wholly precluded in public places such as streets and park
by sweeping general prohibitions and cannot be subjected t
the requirement of permits the granting of which is no
governed by binding rules adequate to insure the exercis
of the rights under reasonable conditions. Perhaps the mos
completely in point of these decisions are *Hague* v. *Com*
mittee for Industrial Organization, 307 U.S. 496, *Schneide*
v. *State*, 308 U.S. 147 (reversing *Commonwealth* v. *Nichols*
301 Mass. 584), *Jamison* v. *Texas*, 318 U.S. 413, and *Tucke*
v. *Texas*, 326 U.S. 517. Pertinent also in some aspects ar
Lovell v. *Griffin*, 303 U.S. 444, *Thornhill* v. *Alabama*, 310 U.S
88, *Carlson* v. *California*, 310 U.S. 106, *Cantwell* v. *Connecti*
cut, 310 U.S. 296, *Largent* v. *Texas*, 318 U.S. 418, *Murdoch*
v. *Pennsylvania*, 319 U.S. 105, *Martin* v. *Struthers*, 319 U.S
141, and *Thomas* v. *Collins*, 323 U.S. 516." (321 Mass. 335,
73 N.E. 2d 241.)

In commenting on the decision by the Supreme Court in
Davis v. *Massachusetts*, the court continued:

"The Commonwealth presses upon us the cases of *Commonwealth* v. *Davis*, 162 Mass. 510 (affirmed sub nomine *Davis* v. *Massachusetts*, 167 U.S. 43), and asks us to follow these decisions, while the defendants ask us to overrule them. These cases also turned upon the validity of ordinances forbidding public addresses upon Boston Common without a permit. We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States. That court in *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, at page 515, while seemingly doubting *Davis* v. *Massachusetts*, 167 U.S. 43, nevertheless distinguishes that case on the ground, as we understand the opinion, that the ordinance in the *Davis* case was not directed solely at the exercise of the rights of speech and assembly, but was addressed as well to other activities that could constitutionally be prohibited."

Mr. Justice Frankfurter, commenting on *Davis* v. *Massachusetts*, 167 U.S. 43, in his concurring opinion in *Niemotko* v. *Maryland*, 340 U.S. at page 279, said, among other things:

"An attempt to derive from *dicta* in the *Davis* case the right of a city to exercise any power over its parks, however arbitrary or discriminatory, was rejected in *Hague* v. *C.I.O.*, supra."

Davis v. *Massachusetts*, 167 U.S. 43, involved a law which required a permit before a speech could be made in the Boston Common. The same decision was relied upon by the state in *Jamison* v. *Texas*, 318 U.S. 413. The unanimous Court said: "It relies primarily on *Commonwealth* v. *Davis*, 167 U.S. 43. This same argument made in reliance upon the same decision has been directly rejected by this Court. . . . Here, the ordinance as construed and applied prohibits the dissemination of information by handbills. As such, it cannot be sustained."

There are other reasons why *Davis* v. *Massachusetts*, 167 U.S. 43, should not be relied upon. They were urged to the court below by the appellant when the certified questions were argued. The contention was succinctly stated by Mr. Justice Baker in his opinion, which was concurred in by Mr. Justice Capotosto. See *State* v. *Fowler*, 83 A. 2d 67. [52-54] Among other things he said: "Also in my opinion *Davis* v. *Massachusetts*, 167 U.S. 43, upon which the majority of the court relies, cannot properly be held to govern the instance case. While it is true that the above-cited case has never been specifically overruled by the Supreme Court of the United States; nevertheless in my judgment that court, in later decisions where it refered to the *Davis* case, has so weakened its effect as an authority that I am unable to accept it as controlling here. Among such decisions are *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, *Jamison* v. *Texas*, 318 U.S. 413, *Saia* v. *New York*, 334 U.S. 558, and *Niemotko* v. *State of Maryland*, 19 Law Week 4095. [340 U.S. 268] See also *Milwaukee County* v. *Carter*, 258 Wis. 139, a recent opinion of a state court of last resort. Several of these cases involve the right of free speech in public parks. The general principles of law applicable to the right of freedom of speech and assembly under the First and Fourteenth Amendments of the constitution of the United States, as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case.

"In addition it may be noted that in *Commonwealth* v. *Gilfedder*, 321 Mass. 335 (1947), the supreme court of that state, in a case involving the right to make an address on Boston Common contrary to an ordinance of that city and certain rules of the board of park commissioners, held such ordinance and rules to be in conflict with the rights of freedom of speech, of the press, and of assembly guaranteed by the First Amendment to the constitution of the United States. At page 342 of that opinion the court makes the

following comment: 'We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States.'" [52-53]

The Supreme Court of New Hampshire in *State* v. *Derrickson*, 97 N.H. 91, 81 A. 2d 312, said: "At this juncture it is important to state that in sustaining the Portsmouth ordinance no reliance is placed on *Davis* v. *Massachusetts*, 167 U.S. 43, which is believed to have been so eroded by the force of time and recent decisions as to be valueless as a binding precedent."

The *Davis* case falls for other reasons. It is among that group of old civil liberties cases where it was held that such liberties were not within the reach of the Fourteenth Amendment against the states, although guaranteed by the First Amendment. The *Davis* case is due for an overruling because this doctrine that the First Amendment is no restraint against the states through the Fourteenth Amendment has been overruled. This Court, in harmony with present-day law, therefore, put at rest one of the old erroneous decisions, *Mutual Film Corp.* v. *Industrial Comm. of Ohio*, 236 U.S. 230, based on the old false principle, in *Burstyn, Inc.* v. *Wilson*, 341 U.S. 329. The *Davis* case was erroneously decided and should be set aside. It should be now overruled because it was decided on the false doctrine that the Fourteenth Amendment did not carry forward the guarantees of the First Amendment. This reason is in addition to the fact that it conflicts with later decisions of this Court above cited.

Public parks have from time immemorial been used as places of public assembly and delivery of speeches of all kinds upon innumerable occasions (*Hague* v. *C.I.O.*, 307 U.S. 496 at page 515; *Schneider* v. *New Jersey*, 308 U.S. 147; *Jamison* v. *Texas*, 318 U.S. 413; *Saia* v. *New York*, 334 U.S.

558; *Niemotko* v. *Maryland*, 340 U.S. 268) and, contrary to the holding of the court below, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *New Jersey*, 308 U.S. 147, 163.

Appellant in this case stands squarely on all the holdings of this Court declaring that ordinances forbidding the holding of public assemblies in parks and the use of public streets for the purpose of preaching the Gospel are void and unconstitutional. The holding here should be the same as the holding in those cases.

While the court below did not say that the city had the right to keep religious groups out of the parks of Pawtucket under the doctrine of separation of church and state, such doctrine may be considered by this Court in this case. The point was presented in *Niemotko* v. *Maryland*, 340 U.S. 268, but not decided. See 340 U.S. at pages 272-273. It is believed that the question now is clearly presented by the ordinance in this case and must be determined here and now. It is submitted that the case here is controlled by *Zorach* v. *Clauson*, 343 U.S. 306, and that *McCollum* v. *Board of Education*, 333 U.S. 203 does not apply. See also *Everson* v. *Board of Education*, 330 U.S. 1.

The position here taken on the lack of constitutional authority in the City of Pawtucket to exclude religious meetings and to prohibit religious talks in the parks of the city is directly supported by *County of Milwaukee* v. *Carter*, 258 Wis. 139, 45 N.W. 2d 90. In that case the ordinance was identical to the one involved here. In that case the facts were the same as those in this case. It involved the holding of a meeting by Jehovah's witnesses in Lake Shore Park in Milwaukee. The court said:

"When, in Article I, Section 3, the Wisconsin Constitution guarantees the right of free speech it does not except or restrict speech on the subject of religion and, if it should, such restriction would be void because in conflict

with and subordinate to the First and Fourteenth Amendments of the United States Constitution, which neither make nor recognize any such limitation. Speech on religious topics is just as free, and no freer, under the constitution as speech on other subjects and on no subject is it free from reasonable regulation to insure public order and safety and to reconcile the exercise of this right with the simultaneous enjoyment of equally sacred rights by others. The Milwaukee County ordinance purports not to regulate but to prohibit speech in public parks on political as well as religious subjects. Section 47.02 (7) provides: 'No sermon, discussion, harangue or speech shall be delivered by any person for political purposes or in connection with the sale of any article or which shall constitute a public criticism or abuse of any religious organization or representative thereof.' Government may, in the interests of public order, safety, and the equitable sharing of facilities, exercise reasonable control over when, where and under what conditions public meetings may be held on public property but to deny to the people all use of the people's property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions. Relying entirely on the facts which this record presents, it appears that Milwaukee county's ordinance is void, as in conflict with both constitutions, and the conviction under it is likewise void and must be set aside."

The constitutional prohibition of joinder of church and state is not controlling here. If a public park dedicated by law and regulation to community purposes by the state cannot be so used by a religious group, then by force of the same reason the public streets could be kept back from use by such religious group. The doctrine of separation of church and state ordained in the First Amendment should not be distorted so as to become an abridgment of liberty. It would result in just that if the construction contended

by the state is accepted here. Since public streets cannot be withheld from religious organizations for exercise of their constitutional rights of free speech, then by force of the same reason public parks that are open for community meetings may be used and cannot be denied to such groups for public meeting purposes.

The contention if made by the State of Rhode Island in this case, that use of the public park for the public meeting and delivery of the talk is a violation of the Constitution because it is appropriation of public funds should not be considered seriously. It is such a slight and inconsequential appropriation as to be unworthy of notice. The doctrine of *de minimis* applies here.

The Court is referred to many cases involving the use of public schools for religious assemblies where the rule of *de minimis* has been applied. The identical argument that has been made here by the state was made in those cases. In the decisions various state courts have held that the use of the school for religious assemblies at times when the school buildings are not used for school purposes is not sectarian use in violation of the Constitution. These holdings were made in decisions rendered prior to the passage of the "Civic Center Acts", which permitted the use of schools for such purposes throughout the country. See *Nichols* v. *School Directors*, 93 Ill. 61; *School Directors* v. *Toll*, 149 Ill. App. 541; *Hurd* v. *Walters*, 48 Ind. 148; *Baggerly* v. *Lee*, 37 Ind. App. 139, 73 N.E. 921; *Townsend* v. *Hagan*, 35 Iowa 194; *Davis* v. *Boget*, 50 Iowa 11; *Gibbert* v. *Dilley*, 95 Neb. 527, 145 N.W. 999; *Greenbanks* v. *Bantwell*, 43 Vt. 207; *Lagow* v. *Hill*, 238 Ill. 428, 87 N.W. 369.

The use of the school building as an assembly place for racial and religious groups under statutes permitting school trustees to permit the use of schoolhouses, when not in use for school purposes for meetings, entertainments, and occasions where admission fees are charged, if such meetings or entertainments are not under exclusive control

and proceeds are not applied for the benefit of a religious sect or denomination or a fraternal or exclusive society, was held not to be unlawful in *Lewis* v. *Board of Education,* 157 Misc. 520, 285 N.Y.S. 164 (modified in other respects in 247 App. Div. 106, 286 N.Y.S. 751, appeal dismissed 276 N.Y. 490, 12 N.E. 2d 172). The court said:

"The manifest vice of the plaintiff's position is that he has confused the racial and religious affiliations of the users of the school buildings with the purpose for which the buildings are used. The restrictions relate to the use. . . . Rather than inimical to the educational policy of the State, or subversive of legitimate use, it is a wholesome thing to have the school buildings, which are maintained at large expense by the taxpayers, used for the purposes and by the groups whose exclusion is here sought. It is the use to which the school buildings are put, and not the identity of the users, that is decisive of the lawfulness of the use."

In *Nichols* v. *School Directors,* 93 Ill. 61, 34 Am. Rep. 160 (1879), it was held that a statute authorizing the directors to grant the temporary use of a schoolhouse, when not occupied by school, for religious meetings, and for such other meetings as the directors might deem proper, and the act of a school district in granting the use of a schoolhouse for religious meetings, was authorized, and did not contravene a constitutional provision that no person should be required to support a place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship, or a provision which forbade any school district from making an appropriation in aid of any church, or for sectarian purposes, or a provision which required all school property to be faithfully applied to the object for which such gifts or grants were made. The court said:

"It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions. The latter one relates

to the subject of a gift or grant, which this schoolhouse is not shown to be, and if it were, it is not perceived wherein an incidental use of the house for the holding of religious meetings, not in any way interfering with school purposes, would in any reasonable sense be inconsistent with its faithful application to the object of the gift or grant. The second provision respects the making of an appropriation or payment from some public fund in aid of any church or sectarian purpose, and it cannot be claimed that this contemplated use of the schoolhouse is such. In what manner, from the holding of religious meetings in the schoolhouse, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings, as he complains in his bill, he does not show. We can only imagine that possibly at some future time he might, as a taxpayer, be made to contribute to the expense of repairs, rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the schoolhouse might in that way cause damage in some degree to the building, upon the idea that continued dripping wears away stone, but the injury would be inappreciable. As respects any individual pecuniary expense which might be in this way involved, we think that consideration may be properly disposed of under the maxim, 'De minimis,' etc. The thing contemplated by the constitutional provision first above named was a prohibition upon the legislature to pass any law by which a person should be compelled, without his consent, to contribute to the support of any ministry or place of worship. Such a matter as the subject of complaint here we do not regard as within its purview. Religion and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state. That instrument itself contains a provision authorizing the legislature to exempt property used for reli-

gious purposes from taxation; and in that manner the indirect supporting of places of worship. In the respect of the possibility of enhanced taxation therefrom, this provision of the Constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the schoolhouse. There is no pretense that it is in any way an interference with the occupation of the building for school purposes." (93 Ill. 61, 34 Am. Rep. 160)

The doctrine of *de minimis* was followed in *State* ex rel. *Conway* v. *District Board,* 162 Wis. 482, 156 N.W. 477. In that case it was held that the offering of a prayer by a Catholic priest or Protestant minister at a public school graduation exercise is not sectarian instruction in violation of the Constitution.

The doctrine of *de minimis* should be applied here. It was applied by the Court in *Everson* v. *Board of Education,* 330 U.S. 1, and *Zorach* v. *Clauson,* 343 U.S. 306, with which compare *Costigan* v. *Hall,* 249 Wis. 94, 23 N.W. 2d 495 and *State* ex rel. *Van Straten* v. *Milquet,* 180 Wis. 109, 192 N.W. 392. See also "Separation of Church and State in the United States" (1950 Wis. L. Rev. No. 3, pp. 452-453, 455) and "Due Process and Disestablishment" (62 Harv. L. Rev. No. 8, pp. 1343-1344).

The United States Constitution guarantees freedom of assembly. No exception of religious assembly was written into the Constitution. If the framers of the Constitution intended to exclude religious assembly from the protection written into the First Amendment, they would have written the exemption into the Amendment. It is absolutely not permitted for a state or city, or their officials, executive, legislative or judicial, to amend the First Amendment by writing into it an exemption or exception which does not appear in the plain language contained in the amendment. If the freedom-of-assembly guaranty in the First Amendment makes secure the right to hold meetings of other kinds

in a public park, it likewise makes secure the right to hold religious meetings therein.

From the beginning of Christianity the streets and parks have been used as places of religious assembly. See first part of argument under Point One of the brief in the companion case of *Poulos* v. *State of New Hampshire*, No. 341, October Term, 1952. See also the Appendix to this brief, printed separately.

It must be assumed that the writers of the Constitution had these historic religious uses of public assembly in mind to include within the guarantee of freedom of assembly when it was written into the First Amendment. This is one of the appropriate uses that is entitled to claim the benefit of this Court's statement in *Hague* v. *C.I.O.*, 307 U.S. 496, at pages 515-516. See also *Jamison* v. *Texas*, 318 U.S. 413, 416.

The doctrine of separation of church and state ought properly to be limited to the boundaries fixed by the framers of the First Amendment. What the authors had in mind was the prohibition of a state church; they intended to exclude any religion from being aided or supported by public funds. The authors of the Amendment did not intend to exclude religion from the benefits of freedom of speech and assembly provided for in the First Amendment. In fact, it has been declared that religion occupies a favored position in the law. It is a well-known fact that the states have explicitly provided that places of public worship shall be exempt from taxation. The Supreme Court of the United States has declared that this is a Christian nation. *Holy Trinity Church* v. *United States*, 143 U.S. 457, 471.

It would be unreasonable to suppose or to contend that the framers of the First Amendment had in mind discriminating against the religious organizations in holding public assemblies. The interpretation of the First Amendment contended for by the state requires this Court to discrimi-

nate against religious and political assemblies in favor of all other types of assemblies. This Court should not write into the First Amendment a discrimination against religious assemblies under the guise of the sophisticated doctrine which is an unlawful stretching of the principle of the separation of church and state. A factitious conclusion would be reached by so doing, which is forbidden by the Constitution. Indeed religious organizations would be discriminated against and the Court would thus misinterpret the guaranty of freedom of assembly appearing in the First Amendment. Compare *Zorach* v. *Clauson*, 343 U.S. 306, where this Court held valid the released-time public school program of New York. It was said that this release from school to attend religious instruction was not barred by the separation clause of the First Amendment.

There has been no appropriation of Slater Park by Jehovah's witnesses. They have not excluded other organizations from the use of the park. Their use of the park is only incidental and synchronizes with the use of the park by all other organizations in Pawtucket for recreational and other purposes. The so-called appropriation of public funds for a religious use by use of the park for holding religious services is so slight and inconsequential and incidental as to be unworthy of notice by this Court in considering the so-called applicability of the doctrine of separation of church and state.

It is respectfully submitted that the proper holding by this Court should be that religious assemblies stand on the same strong basis under the First Amendment as do assemblies by any other group for any other purpose in a public park. This Court should hold that the use of the park for a religious service is proper and within the strong protecting shield of the First Amendment. The Court should conclude that the ordinance, on its face and as enforced and construed by the City of Pawtucket, abridges the rights of the appellant to freedom of speech, assembly, worship and

conscience, contrary to the First and Fourteenth Amendments to the United States Constitution.

The court below unlawfully injects the use of the sound device into the question to be decided in this case. That element is entirely irrelevant. There was no objection to the use of the sound device at any time. The arresting officer testified that it was a lawful and peaceful use of the park, except for the fact that a religious meeting was prohibited. [18-19] The complaint did not charge appellant with unlawfully using a sound device. It charged him with addressing a religious assembly contrary to the provisions of the ordinance. The ordinance does not deal with the use of sound devices.

This Court has frequently held that abuses of the exercise of the right do not justify laws which prohibit or censor the exercise of the right itself. To be valid an ordinance punishing for the use of a sound device in a loud and raucous manner must deal with the abuse of the use and not censor or prohibit the use. Compare *Kovacs* v. *Cooper*, 336 U.S. 77 with *Saia* v. *New York*, 334 U.S. 558. The court below did not have a narrowly drawn zoning ordinance like the Pennsylvania courts had in *Commonwealth of Pennsylvania* v. *Geuss*, 168 Pa. Super. 22, 76 A. 2d 500 and 368 Pa. 290, 81 A. 2d 522, appeal dismissed *sub nomine Geuss* v. *Pennsylvania*, 342 U.S. 912, which is cited and relied upon by the court below.

There was not an attempt to zone the parks of Pawtucket so as to prohibit a religious meeting in this particular park. The ordinance here prohibited religious and political meetings in all parks of the city. There were no parks anywhere in the city where a religious or political meeting could be held. Such meetings were banned in all public parks in the city.

The court below implies that the City of Pawtucket had limited the dedication of the park. It is said, however, that Slater Park "has been maintained as a public park". Being

a public park, it was open for all park purposes (including religious and political speeches) in the absence of a specific limitation in the deed to the city or a restricted dedication confining the use to recreation and rest and excluding religious and political meetings. Since there has been no such limitation as a matter of fact it cannot be grafted on to the use of the public park by judicial amendment of the facts. This ruling amounted to an ex post facto law.

A patent inconsistency appears on the face of the opinion of the court below in a statement made which also is contradicted by the facts in the case. The court says that a person using the park for recreation is entitled not to have another person destroy his "rights to use the park for its dedicated purposes of rest and recreation". [8] In the first part of the opinion the court stated that mere assembly could be held "without unduly interfering with the use of the park by others". [2] It was stipulated in this case that there was space in the park "for assemblies of these kinds and that assemblies can be held without interfering with these other activities". [14] The undisputed testimony of the appellant was that the holding of the assembly was at a place in the park where it did not interfere with the other uses of the park by other persons at the same time. He also testified that the group he spoke to was out of sight of any other group using the park for other purposes. [18-19, 28-29]

The interference of the use of the park by other persons was a fact that had to be proved by the prosecution. There was no such proof received. There is no inference that can be drawn from the testimony that the holding of the assembly and the giving of the talk by the appellant in any way interfered with the use of the park by others. Since the state failed to prove that the use of the park interfered with the rights of others, it is beyond the constitutional authority of the court to find or infer that the use did interfere with the other uses of the park. See *Busey* v. *District of Colum-*

bia, 78 App. D.C. 189, 138 F. 2d 592 at page 595; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639; *Thomas* v. *Collins*, 326 U.S. 516, 529-530; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153. The use of the sound device to address the 400 persons in the audience did not *per se* constitute interference with the rights of others in the park who were not attending the assembly. *Saia* v. *New York*, 334 U.S. 558.

The vehicle used by the court below collided head-on with the standing decisions of this Court, when that court held that a prohibitory ordinance was regulatory. Regulation is confined to time, place and manner of the exercise of the right. *Schneider* v. *New Jersey*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296. An outright prohibition of the exercise of the right is not regulation. Laws prohibiting the exercise of the rights guaranteed by the Constitution are not valid. Mr. Justice Reed for a majority of the Court in the defunct decision styled *Jones* v. *Opelika*, 316 U.S. 584, said: "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori*, invalid." (316 U.S. at pages 505-506) This case was reversed in 319 U.S. 103, but this particular holding was not.

Prohibition is regulation only when the ordinance deals with the abuse of the exercise of the right. *Kovacs* v. *Cooper*, 336 U.S. 77, is an example of this. There, without reversing *Saia* v. *New York*, 334 U.S. 558, the Court held valid a law which prohibited loud and raucous noises emitted from a sound device on the streets. The ordinance here is not narrowly drawn so as to prohibit an abuse of holding assemblies and giving religious and political talks in a public park. There is no abuse shown. It was not contended in this case that there was an abuse of the right.

The state and the court below are confronted with a record where it is stipulated that the assembly was peaceful and lawful in all respects save and except for the fact that

it was a religious assembly and a religious talk was given to the group in violation of the ordinance.

The court below struck another discordant legal note. The symphony in the field of civil liberties was marred in the holding that it was necessary to find beyond a reasonable doubt that the ordinance was unconstitutional. It is submitted that in the case of civil liberties guaranteed by the First Amendment there is no presumption of validity but there is a presumption of invalidity unless the state claiming the right to abridge those liberties, shows to the satisfaction of the court that the ordinance is valid. (*Busey* v. *District of Columbia*, 78 App. D.C. 189, 138 F. 2d 592, 595; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *Thomas* v. *Collins*, 326 U.S. 516, 529-530; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153.)

Conclusion

For the reasons stated, the judgment below should be reversed and the prosecution ordered dismissed.

Respectfully submitted,

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